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Right to Be Present: People v. Mitchell

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N.Y. CONST. art. I, § 6:

In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature of the cause of the accusation and be confronted with the witnesses against him.

U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and . . . to be confronted with the witnesses against him . . .

COURT OF APPEALS

People v. Mitchell²⁰³⁶
(decided December 17, 1992)

In three consolidated cases,²⁰³⁷ the defendants claimed that the rule set forth in *People v. Antommarchi*²⁰³⁸ should be applied retroactively rather than prospectively. The court held that the *Antommarchi* rule, which states that trial courts cannot question potential jurors about that juror's bias or hostility unless the defendant is present should be applied prospectively only.²⁰³⁹ Accordingly, the court found no violation of the defendants'

2036. 80 N.Y.2d 519, 606 N.E.2d 1381, 591 N.Y.S.2d 990 (1992).

2037. The three cases simultaneously decided by the *Mitchell* court include *People v. Chambers*, 180 A.D.2d 541, 579 N.Y.S.2d 408 (1st Dep't 1992), *People v. Mitchell*, 174 A.D.2d 579, 572 N.Y.S.2d 650 (2d Dep't 1991) and *People v. Casiano*, 176 A.D.2d 632, 575 N.Y.S.2d 478 (1st Dep't 1991).

2038. 80 N.Y.2d 247, 604 N.E.2d 95, 590 N.Y.S.2d 33 (1992). In *Antommarchi*, the New York Court of Appeals held that trial courts cannot question potential jurors about that juror's bias or hostility unless the defendant is present. *Id.* at 250, 604 N.E.2d at 97, 590 N.Y.S.2d at 35.

2039. *Mitchell*, 80 N.Y.2d at 528, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995. The pre-*Antommarchi* rule permitted trial courts to question prospective jurors about that juror's bias or hostility in the defendant's absence. *Id.*

constitutional²⁰⁴⁰ or statutory²⁰⁴¹ right to be present and affirmed the convictions of the defendants.²⁰⁴²

The facts in all three cases are indistinguishable for purposes of this appeal.²⁰⁴³ The trial court questioned prospective jurors during side-bar conferences held in the defendants' absence.²⁰⁴⁴ The trial court then inquired whether the prospective juror, or the juror's friends or relatives, had been the victim of a crime or involved in a criminal proceeding.²⁰⁴⁵ Since *Antommarchi* prohibited such questioning in the defendant's absence, the defendants contended that their right to be present was violated.²⁰⁴⁶ This claim, however, was dependent upon a finding that the *Antommarchi* rule should be applied retroactively.

Because *Antommarchi* was based on state law,²⁰⁴⁷ the court concluded that state rules on retroactive application applied.²⁰⁴⁸

2040. U.S. CONST. amends. V, XIV. The federal constitutional right to be present is not absolute, rather, "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Mitchell*, 80 N.Y.2d at 526, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 107-08 (1934)).

2041. N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1981).

2042. *Mitchell*, 80 N.Y.2d at 529, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995.

2043. *Id.* at 530, 606 N.E.2d at 1386-87, 591 N.Y.S.2d at 995-96. The court affirmed the convictions of defendants Mitchell and Casiano, since it declined to apply the *Antommarchi* rule retroactively. *Id.* The conviction of defendant Chambers, however, was reversed as a violation of *Batson v. Kentucky*. *Id.* See *Batson v. Kentucky*, 479 U.S. 79 (1986) (holding that use of peremptory challenges to exclude racial minorities from a jury constitutes a violation of equal protection).

2044. *Mitchell*, 80 N.Y.2d at 524, 606 N.E.2d at 1383, 591 N.Y.S.2d at 992.

2045. *Id.*

2046. *Id.*

2047. The decision rendered in *Antommarchi* was based on a violation of N.Y. CRIM. PROC. LAW. § 260.20. See *Antommarchi*, 80 N.Y.2d at 250, 604 N.E.2d at 97, 590 N.Y.S.2d at 35.

2048. *Mitchell*, 80 N.Y.2d at 527-28, 606 N.E.2d at 1385, 591 N.Y.S.2d at 994. The defendant claimed that the Supreme Court's decision in *Griffith v. Kentucky*, 479 U.S. 314 (1987), was binding on the New York Court of Appeals. *Id.* at 526, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993. In *Griffith*, the

Relying on an earlier decision in *People v. Pepper*,²⁰⁴⁹ the *Mitchell* court determined that the *Antommarchi* rule should be applied prospectively.²⁰⁵⁰ In *Pepper*, the New York Court of Appeals held that three factors are to be evaluated in order to determine whether to confer retroactive effect to a new rule or to apply the old rule prospectively.²⁰⁵¹ These factors include “(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice of retroactive application.”²⁰⁵²

Applying the first factor, the *Mitchell* court found that the purpose of the rule is to permit the defendant to have a more active role in juror examination and selection and not to correct any constitutional debility inherent in pre-*Antommarchi* practices.²⁰⁵³ Furthermore, the court noted that retroactive application is not absolutely necessary since involvement in the side-bar conference does not relate directly to the fact-finding process.²⁰⁵⁴ Turning to the second factor, the court found that

Supreme Court held that new constitutional rules must be given retroactive effect to those cases which are pending on direct review or not yet final. 479 U.S. at 322. The New York Court of Appeals, however, rejected the defendant’s contention, noting that retroactive application is an issue of state law when federal constitutional principles are not implicated. *Mitchell*, 80 N.Y.2d at 526, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993. Since *Antommarchi* was decided on the basis of state law, the court was not bound to follow *Griffith*, and thus rejected defendant’s argument. *Id.*

2049. 53 N.Y.2d 213, 423 N.E.2d 366, 440 N.Y.S.2d 889, *cert. denied*, 454 U.S. 967 (1981).

2050. *Mitchell*, 80 N.Y.2d at 526-28, 606 N.E.2d at 1385-86, 591 N.Y.S.2d at 994-95.

2051. *Pepper*, 53 N.Y.2d at 220, 423 N.E.2d at 369, 440 N.Y.S.2d at 891-92.

2052. *Mitchell*, 80 N.Y.2d at 528, 606 N.E.2d at 1385, 591 N.Y.S.2d at 994 (citing *Pepper*, 53 N.Y.2d at 220, 423 N.E.2d at 369, 440 N.Y.S.2d at 892 and *People v. Morales*, 37 N.Y.2d 262, 269, 333 N.E.2d 330, 334, 372 N.Y.S.2d 25, 32 (1975)).

2053. *Mitchell*, 80 N.Y.2d at 528, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995.

2054. *Id.* (citing *Pepper*, 53 N.Y.2d at 221, 423 N.E.2d at 369, 440 N.Y.S.2d at 892 and *Morales*, 37 N.Y.2d at 269, 333 N.E.2d at 344, 372 N.Y.S.2d at 32 (1975)).

there has been substantial reliance by the courts on the prior practice.²⁰⁵⁵ Prospective jurors have routinely been examined in defendants' absence to expedite the voir dire process, to prevent juror embarrassment and to promote juror candor.²⁰⁵⁶ With reference to the third factor, the court reasoned that since jury selection is conducted in every jury trial, an inordinate amount of criminal convictions on appeal will present an *Antommarchi* question.²⁰⁵⁷ Thus, review of appeals based on *Antommarchi* would cause a significant burden to the administration of justice and would defer the disposition of an exorbitant amount of pending cases.²⁰⁵⁸ Furthermore, the court noted that in many of these cases there is no record from which review can be made.²⁰⁵⁹ Consequently, the Court held that the *Antommarchi* rule applies only to those cases in which jury selection occurred after the date *Antommarchi* was decided.²⁰⁶⁰

Under Federal law, the United States Supreme Court has adopted a different rule on retroactive application than applied by the New York Court of Appeals in *Pepper*.²⁰⁶¹ In *Griffith v. Kentucky*,²⁰⁶² the Court held that new rules involving constitutional issues are to be applied retroactively to all cases which are on appeal.²⁰⁶³ The Supreme Court, in *Griffith*, set forth several reasons for its holding.²⁰⁶⁴

First, the Court noted that the integrity of judicial review mandates application of a new rule to all similar cases.²⁰⁶⁵ The basic norms of constitutional adjudication would be violated in the event that a newly declared rule is not applied to cases

2055. *Mitchell*, 80 N.Y.2d at 528, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995.

2056. *Id.*

2057. *Id.* at 529, 606 N.E.2d at 1386, 595 N.Y.S.2d at 995.

2058. *Id.*

2059. *Id.*

2060. *Id.*

2061. *Id.* at 525-26, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993.

2062. 479 U.S. 314 (1987).

2063. *Id.* at 328.

2064. *Id.* at 323.

2065. *Id.*; see also *Mackey v. United States*, 401 U.S. 667, 679 (1971).

pending on direct review.²⁰⁶⁶ Secondly, selectively applying a new rule contravenes the proposition that similarly situated defendants should be treated alike.²⁰⁶⁷ Moreover, failure to apply new rules retroactively to cases pending on appeal is inequitable because similarly situated defendants are treated arbitrarily, with some receiving the benefits of the new rule, while others do not.²⁰⁶⁸

In conclusion, federal courts apply a new rule for the conduct of criminal prosecutions retroactively to all cases pending on direct review or those which are not yet final.²⁰⁶⁹ Where a federal constitutional issue is involved, New York courts must adhere to federal rules on retroactivity.²⁰⁷⁰ However, where no federal constitutional issue is implicated, New York courts balance the three factors enumerated in *Pepper* to determine whether retroactive application of a new rule is warranted.²⁰⁷¹

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

People v. Hannigan²⁰⁷²
(decided August 30, 1993)

The defendant contended that his constitutional right to be present during side-bar voir dire pursuant to the State²⁰⁷³ and

2066. *Griffith*, 479 U.S. at 322.

2067. *Id.* at 323.

2068. *Id.*

2069. *Id.* at 328.

2070. *Mitchell*, 80 N.Y.2d at 526, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993.

2071. *Id.* at 528, 606 N.E.2d at 1385, 591 N.Y.S.2d at 994.

2072. 193 A.D.2d 8, 601 N.Y.S.2d 928 (2d Dep't 1993).

2073. N.Y. CONST. art. I, § 6. This section states in relevant part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel"